ARGUMENT

In *Miller-El v. Cockrell* the United States Supreme Court stated that the 5th Circuit Court should have issued a COA to review the District Courts denial of Habeas Relief to the Petitioner. The court also stated that Before a Prisoner seeking Post Conviction Relief under 2254 may Appeal a District Courts Denial or Dismissal of the Petition, he must first seek and obtain a COA from a Circuit Justice or Judge, 2253. This is a Jurisdictional Prerequisite. A COA will issue only if 2253's requirements have been satisfied. When a Habeas Applicant seeks a COA, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merits of his claims. E.g. Slack v. McDaniel 529 US at 481, this inquiry does not require full consideration of factual or legal basis supporting the claims. Consistent with this Court's Precedent and the Statutory text, the Prisoner need only Demonstrate "a Substantial Showing of the Denial of a Constitutional Right" 2253 (c) (2). He satisfies this standard by demonstrating that Jurist of Reason could disagree with the District Court's resolution of his case or that the issues Presented were adequate to deserve Encouragement to Proceed Further. E.g. id at 484, he need not convince a Judge, or, for that matter three Judges, that he will Prevail, but must demonstrate that reasonable Jurist would find the District Court's Assessment of the Constitutional Claims debatable or wrong.

The Court also stated that where 28 USC 2254 applies, the Court's Habeas Jurisprudence embodies this difference. Factual determinations by State Courts are Presumed correct absent clear and convincing evidence to the contrary 2254 (e) (1) and a decision adjudicated on the merits in a State Court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the State Court Proceeding 2254 (d) (2). Even in the context of Federal Habeas deference does not imply abandonment or abdication of Judicial Review.

In this case the 4th Circuit Court of Appeals did not give full consideration to the substantial evidence this Petitioner put forth in support of the case. Instead, it accepted without question the District and

State's Court's evaluation of the case. The evidence and documents submitted through the State Courts and on Habeas Petition. shows with clear and convincing evidence that this Petitioner is not Procedurally Barred and has shown clear and convincing evidence of a *US v. Giglio*, *US v. Agurs* violation.

Affidavits, documents and Captain Holland's Re-sentencing Hearing Testimony, shows where he admitted to removing photo(s) of the Chief of Police's son from the evidence gathered during the search of the Petitioner's residence. The videodisc submitted by the Petitioner where the State Witness (Emily Call) admits she had a deal not to be prosecuted should all amount to a Substantial Showing of a denial of a Constitutional Right. Any reasonable Jurist would find after reviewing this evidence that this Petitioner's Constitutional Claims are debatable and that the dispositive Procedural ruling by the District court are also debatable and wrong.

This is the September 1998 Trial Testimony of Captain Butch Holland the Leading Investigator in the case. All questions are by the District Attorney and answers are by Captain Holland.

Page 154 Trial Transcript 1998

13- Q. All Right. Have these photos been kept in your care
14- and custody and control since they were seized?
15- A. They Have
16- Q. And have you added or subtracted or altered these
17- photo's in anyway?
18- A. No sir we have not.
19- Mr. Greene: States going to move to introduce
20- States Exhibit number 10

Appendix I-Attorney Klinkosum is now questioning

Page 48 of 2001 Re-sentencing Hearing

10- Q. Now you testified at trial that those photographs
11- had been in your care, custody and control, is that
12- correct.
13- A. That's correct.
14- Q. And in you request for admissions at number
15- 23...

16- Mr. Klinkosum... May I approach the witness
17- your Honor?
18- the Court: Sure
19- Q. (does so) The question at number 23 ask:
20- Defendant Pendry removed the photos from the gathered
21- gathered evidence at some point during the investigation,
22- and the response was: Detective Holland gave David Pendry
23- the photographs of Chad Pendry and three other men which
24- was removed, which was returned to Detective Captain
25- Holland the following day and placed with the other

Page 49

1- evidence from the miller residence? That's what that
2- says?
3- A. That's correct.
10- Q. So Detective Holland, at trial you testified that
11- those Photographs were in your Possession, but in the
12- request for admission, you testified that one was taken
13- out and then given back to you, is that correct?
14- A. That is correct.
15- Q. Why did you testify that way at trial?
16- I....
17- DA Mr. Green: OBJECTION to the relevance, your
18- Honor.
19- The COURT: Are we to that Point were you said
20- you were going to lead, Mr. Klinkosum?
21- Mr. Klinkosum: We are, your Honor.
22- The COURT: Overruled let's see what he has to
23- say, you may answer the question.
24- (NO ANSWER)
25- Q. Nothing further

Page 51 of 2001 Re-sentencing Hearing.

Attorney Klinkosum is asking the questions and Chief David Pendry is answering.

22- Q. Okay. Do you in fact recall receiving a Picture
23- with your son in it from the residence?

24- No Sir.
25- Q. You don't recall that?
Page 52
1- A. No...
2- Mr. Green....OBJECTION, to this line of
3- Questioning, your Honor.
4- The Court: OVERRULED
5- Q. Did Butch Holland give you a picture of Chad Pendry
6- That was seized from the Miller residence?
7- A. At what point are you talking about?
8- Q. Well I'm talking about at any point during the
9- Investigation. Did you receive a Picture from Detective
10- Captain Butch Holland?
11- A. Yes

The Removal of evidence requires reversal of conviction.

In *Slack v. McDaniel*, the United States Supreme Court did not address whether or not *Slack* had made a Substantial Showing of the denial of a constitutional right, instead they addressed whether Jurist of reason could conclude that the District Courts dismissal on Procedural Grounds was debatable or incorrect.

The Court concluded that *Slack* had demonstrated that reasonable Jurist could conclude that the District Courts abuse of the WRIT holding was wrong, as in the case at hand; Reasonable Jurist could conclude that the District Courts rulings are wrong.

The Court also stated in determining whether a COA should be issued where the Petition was dismissed on Procedural grounds has two components, one directed at the underlying Constitutional claims and one directed at the District Courts Procedural Holding.

In looking at the Petitioner's Constitutional Claims, Petitioner was convicted on September 24, 1998; Petitioner's Trial Attorney was fired no more then three days after trial. Petitioner then hired Attorney John Hall to represent him on Appeal. Petitioner filed an Appeal and on April 18, 2000 the Court of Appeals remanded the case for Re-sentencing. On March 19, 2001, some eleven months later, Petitioner's Trial Attorney

came forward and signed an Affidavit stating the District Attorney came to his office after the trial and admitted he had an arrangement not to prosecute the State's witnesses. Some 30 days later on April 11, 2001, Petitioner filed a MAR raising a Giglio Violation.

In October of 2001 the District Attorney filed a response and submitted an Affidavit. In his Affidavit he admits there was a Deal, he also admits he did not believe he was required to disclose the deal. He also states that District Attorney Harding made the decision not to prosecute the State's Witnesses.

Here the Petitioner has submitted two Affidavits from two Attorney's which both admit that there was a deal made and that deal or arrangement was never disclosed as required by N.C. Statue 15A-1054 and the United States Supreme Court in *US v. Giglio*, *US v. Agurs*, *Charles B. Splunge v. ALC Parke*, *NaPue v. Illinois*, *Mooney v. Holohan*, and *Pyle v. Kansas*.

The Petitioner's Affidavits answers any debatable questions about the underlying Constitutional Claim. This Petitioner has met the requirements of 2253 and has demonstrated a Substantial Showing of the denial of a Constitutional Right.

These Affidavits demonstrate that Jurist of reason could disagree with the District Courts resolution of this case. Petitioner's claim of a Giglio violation at the least should be adequate to deserve encouragement to proceed further.

In looking at the District Courts Procedural Denial of Habeas Relief, the court relied on one statement made during re-sentencing by the Petitioner to deny the Petitioner's claims that Police removed photos of the Chief of Police's son from the evidence before trial and then testified that the evidence had been in his sole care custody since it was seized, Perjuring himself at trial, to deny the Petitioner's Habeas Corpus. The Petitioner corrected his testimony, on page 94 of the re-sentencing transcript. (see appendix c District Court's order page 8 footnote 7 where he refers to re-sent hearing trans. Pp...91-93)

Conclusion

Petitioner's Affidavits from Attorney Gregory Brewer and District Attorney Graham Greene (Appendix G) show clear and convincing Evidence of a *Giglio Violation*, a violation of the Petitioner's Rights as Protected under the 14th Amendment of the United States Constitution. Appendix I, shows that the State Court errored when it encompassed Attorney Brewer's MAR under 15A-1414 into 15A-1415 causing Judge Helms to Deny Petitioner's MAR as being previously heard on the merits. Appendix H, shows Captain Holland's Trial Testimony was Perjured and showed clearly he tampered with the evidence of the case, to protect the Chief of Police's son from Prosecution.

This is clear and convincing evidence of a Due Process Violation which would show a Substantial Showing that this Petitioner's Constitutional Rights where Violated.

This Petitioner asserts that his conviction resulted from the Prosecution's knowing use of perjured testimony. A conviction acquired through the knowing use of perjured testimony by the prosecution violates due process. See *Napue v. Illinois 360 US 264,269 (1959).*

This is true regardless of whether the Prosecution solicited testimony; it knew to be false or simply allowed such testimony to pass uncorrected. See *Giglio v. US.* And knowingly false or "misleading" testimony by a law enforcement officer is imputed to the Prosecution. See *Wedra v. Thomas 671 F.2d 713, 717 nl (3rd circuit) 1982, Curran v. Delaware 259 F.2d 707,712-13 (3rd circuit) 1958, Pyle v. Kansas 317 US 213 (1942), Boone v. Paderick 541 F.2d 447, 450-51 (4th circuit) 1976.*

The 4th Circuit has explained, the Police are also part of the Prosecution, and the taint on the trial is no less if they, rather then the State's Attorney were guilty of the nondisclosure. If the Police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession that had been removed or allowed, the State's officer is practicing deception not only on the State's Attorney but also on the court and the Defendant. *Barbee v.*

Warden, MD Penitentiary 331 F.2d 842, 84o (4th circuit) 1964, Kyles v. Whitley 514 US 419, 433 n.7 (1995), US v. Agurs, Us v. Ellis 121 F.3d 908, 915 n.5 (4th circuit) 1997, US v. Kelly 35 F.3d 929, 933 (4th circuit) 1994.

During this Petitioner's trial Captain Holland testified that he had not added or subtracted or altered any of the evidence. At the June 6, 2000 re-sentencing hearing he testified he gave Chief David Pendry a photo of his son, which makes his trial testimony perjured. In *Kyles v. Whitley*, the court stated one does not show a Brady Violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Here Captain Holland has admitted to removing a photo. The Petitioner states the Police removed a 35-millimeter camera with film of the victim and the Chief of Police's son engaging in acts. Captain Holland's conduct prior to and during trial is a clear due process violation.

Prosecutor Greene's misconduct, failure to disclose the deal with his witnesses, using perjured testimony from Jeretta Miller to enter evidence into the trial and Captain Holland's lies as to the evidence had not been altered violates due process.

Here, there is no way the evidence could have amounted to overwhelming proof of this Defendant's guilt. The victim testified the events never took place and that during the time of the alleged indictments; she was sexually active with the Chief of Police's son. All the more reason for the removal of the exculpalinary photos of the Chief's son and the victim.

This is clear and convincing evidence of a Due Process Violation, which would show a Substantial Showing that this Petitioner's Constitutional Rights were violated. Holland's own Perjured testimony violates the Petitioner's Rights to a fair trial as Protected under the 14th Amendment.

WHEREFORE, the Petitioner respectfully request this court to issue it's Certiorari and allow this Petitioner to Proceed with his Appeal from the District Courts order denying the Petitioner's Habeas Review. The Petitioner respectfully request that he be released from custody or a new trial be ordered in this case. Petitioner respectfully request the case be remanded to the 4th Circuit Court of Appeals for further review of his Appeal.

Certificate of Service

I hereby Certify that I have this day served a copy of the Petition For Certiorari, to the United States Supreme Court , upon the Respondent by placing same in the United States Mail, First Class Certified, Postage Paid addressed as follows:

Attorney General
Attn: Sandra Wallace Smith
P.O. Box 629
Raleigh, NC 27602

This 23 day of February. 2006

James Miller
2-23-06

Petitioner's Petition should be deemed filed as of _____.

James E. Miller
James E. Miller
Po Box 608
Spruce Pine NC
2-23-06 28777

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Lewis F. Powell, Jr. United States Courthouse Annex
1100E. Main Street, Suite 501
Richmond, Virginia 23219-3517

Patricia S. Conner
Clerk

www.ca4.uscourts.gov

Telephone
(804)916-2700

December 9, 2005

James Edward Miller
Avery Mitchell Correctional Institution
#0281953
P.O. Box 608
Spruce Pine, NC 28777

Sandra Wallace-Smith, Esq.
North Carolina Department of Justice
Corrections Section
P.O. Box 629
Raleigh, NC 27602

Re: 05-6532 Miller v. Walker
CA-01-135-5

Enclosed is a copy of an order filed today in this case.

Yours truly,
Patricia S. Connor
Clerk
s/ Sue Nagle
Deputy Clerk

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
December 9, 2005

No. 05-6532
CA-01-135-5

James Edward Miller
Petitioner- Appellant

v.

Dean R. Walker, Superintendent
Respondent- Appellee

ORDER

Appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.
Entered for a panel composed of Judge Traxler, Judge Michael, and Judge Gregory.

For the Court-By Direction
/s/Patricia S. Connor
CLERK

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
Lewis F. Powell, Jr. United States Courthouse Annex
1100E. Main Street, Suite 501
Richmond, Virginia 23219-3517

Patricia S. Conner
Clerk

www.ca4.uscourts.gov

Telephone
(804)916-2700

December 9, 2005

James Edward Miller
Avery Mitchell Correctional Institution
#0281953
P.O. Box 608
Spruce Pine, NC 28777

Sandra Wallace-Smith, Esq.
North Carolina Department of Justice
Corrections Section
P.O. Box 629
Raleigh, NC 27602

Re: 05-6532 Miller v. Walker
CA-01-135-5

Enclosed is a copy of an order filed today in this case.

Yours truly,
Patricia S. Connor
Clerk
s/ Sue Nagle
Deputy Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed
December 9, 2005

No. 05-6532
CA-01-135-5

James Edward Miller
Petitioner- Appellant

v.

Dean R. Walker, Superintendent
Respondent- Appellee

ORDER

Appellant has filed a petition for rehearing.
The Court denies the petition for rehearing.
Entered for a panel composed of Judge Traxler, Judge Michael, and Judge Gregory.

For the Court-By Direction
/s/Patricia S. Connor
CLERK

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
5:01CV135-1-MU

JAMES E. MILLER)
Petitioner,)
)
v.) **ORDER**
)
DEAN WALKER, Supt.,)
Respondent.)
)

THIS MATTER is before the Court on Respondent's Answer and Motion for Summary Judgment, filed on October 30, 2001; and Petitioner's Motions for Summary Judgment filed November 6, 2001, and November 26, 2001. Upon a review of the record, the arguments, and applicable authorities, the Court finds that Respondent's Motion for Summary Judgment should be granted; Petitioner's Motions for Summary Judgment should be denied; and Petitioner's § 2254 petition for writ of habeas corpus should be dismissed.

SUMMARY OF THE RECORD

On September 24, 1998, in the Superior Court of Wilkes County, Honorable Howard R. Greeson, judge presiding, Petitioner was convicted, after trial by jury, of two counts of statutory sexual offense, five counts of taking indecent liberties with a minor, first degree sexual exploitation, and statutory rape in case 98 CRS 1207, 1248-49, and 2875-76. Judge Greeson sentenced Petitioner to five consecutive terms of a minimum of 19, a maximum of 23 months, imprisonment on each count of taking indecent liberties with a minor, and a minimum of 77 months, a maximum of 102 months, on the first degree sexual exploitation conviction to begin at the expiration of the previous

sentences. the Court consolidated the two statutory sexual offense convictions and the statutory rape conviction and sentenced Petitioner to a minimum of 234, a maximum of 326 months, imprisonment for these convictions.

On October 5, 1998, Petitioner, through counsel, filed a Motion for Appropriate Relief (MAR) which was denied in November 1998. On November 30, 1998 Petitioner directly appealed his conviction and sentence. On April 18, 2000, the North Carolina Court of Appeals issued an opinion finding error in Petitioner's conviction of statutory sexual offense in case 98 CRS 2875 and vacated that conviction. The appeals court found no error in the remaining convictions but remanded for re-sentencing because Petitioner had not been accorded the allocution right specified in N.C.G.S. § 15A-133 (b).

On June 6, 2000, in the Superior Court of Wilkes County, Petitioner was re-sentenced. At Petitioner's re-sentencing hearing the Honorable Michael E. Helms consolidated Petitioner's convictions for sentencing and sentenced Petitioner to a minimum of 230, a maximum of 285 months, imprisonment. On August 27, 2001, the North Carolina Court of Appeals issued an unpublished opinion finding no error in Petitioner's re-sentencing.

On or about April 11, 2001, Petitioner filed a second MAR with the Wilkes County Superior Court which was denied on May 31, 2001, by Judge Helms. Petitioner then filed a writ of certiorari with the North Carolina Court of Appeals requesting review of the denial of his second MAR. Petitioner's writ of certiorari was denied on July 16, 2001.

On July 31, 2001, Petitioner filed his present federal habeas petition. In his petition, Petitioner contends that: (a) his conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence favorable to Petitioner; (b) his conviction was obtained by use of evidence acquired by an unconstitutional search and seizure; (c) he was denied effective assistance of counsel; and (d) there was prosecutorial misconduct.

ANALYSIS

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which

greatly circumscribes a federal habeas court's review of state court decisions, governs this case. 28 U.S.C. §2254.

The threshold inquires for a federal court reviewing a federal habeas petition are whether the petitioner has exhausted his claims before the appropriate state courts and whether those claims are procedurally barred. 28 U.S.C. §2254. In order to exhaust a claim a petitioner must have fairly presented it to the state courts. See Baker v. Corcoran, 220 F.3d 276, 288 (4th cir. 2000), cert. denied, 531 U.S. 1193 (2001).

If a petitioner's claim is unexhausted, it may be treated if it is clear that the claim would be procedurally barred under state law if the petitioner attempted to present it to the state court. See id. However, when the procedural bar that gives rise to exhaustion provides an independent and adequate state law ground for the conviction and sentence it prevents federal habeas review of the defaulted claim unless the petitioner can establish cause and prejudice for the default. See id.

If a petitioner's claims are exhausted and not procedurally barred, the federal court must next examine whether or not the petitioner's claims were "adjudicated on the merits" by the state court. If the claim was properly presented to the state court and the state court adjudicated it, the deferential standard of review set forth in 28 U.S.C. §2254(d) applies. If a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits,[1] a federal court reviews the claim questions of law and mixed questions of law and fact de novo. Angelone v. Weeks, 176 F.3d 249, 258 (4th Cir. 1999), aff'd, 527 U.S. 1060 (2000).

---

[1] If the state court has not ruled on the merits of a claim because it has expressly denied a habeas petitioner's claim based on an independent and adequate state procedural rule such claim is considered procedurally defaulted in federal court. See Breard v. Pruett, 134 F.3d 615, 619 (4th Cir.), cert. denied, 523 U.S. 371 (1998).

The standard of review set forth in §2254 is to be applied to "all claims adjudicated on the merits,' that is, those claims substantively reviewed and finally determined as evidenced by the state court's issuance of a formal judgment or decree." Thomas v. Davis, 192 F.23d 445, 455 (4th

Cir. 1999). The standard of review is "quite deferential to the rulings of the state court." Burch v. Corcoran, 273 F.3d 577, 583 (4th Cir. 2001) cert. denied, 535 U.S. 1104 (2002). This deference extends to summary dismissals. See Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000), cert. denied, 531 U.S. 1095 (2001).

Pursuant to §2254(d) a federal court may not grant a writ of habeas corpus unless the state court's adjudication: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"...; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding...." Id. (internal citations omitted).

The Supreme Court has explained that a state court adjudication is "contrary" to clearly established federal law, only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 413 (2000), quoted in Burch. An unreasonable application is different from an incorrect application of federal law, the former being the requisite showing. Therefore, this Court may not issue the writ even if it concludes in its own independent review, that the relevant state court merely made an incorrect or erroneous application of the correct federal principles. Id.

WITNESS IMMUNITY CLAIM

Petitioner alleges that the prosecution violated his constitutional rights when the prosecution failed, prior to trial, to disclose evidence favorable to him. More specifically, Petitioner contends that the State withheld from the defense the fact that three of the witnesses who testified against him were promised immunity from prosecution. In support of his contention Petitioner submits an affidavit of his trial counsel setting forth that the prosecution informed him shortly after the conclusion of Petitioner's trial that the State could not prosecute three of the witnesses who testified against Petitioner because the State had "arrangements"

with them for immunity from prosecution. (Brewer Aff.).[2]

Petitioner raised his Brady/Giglio claim in his first MAR.[3] After a hearing on his first MAR, where Petitioner was represented by counsel, Judge Greeson dismissed this claim because he found that it was not supported by affidavit in violation of N.C.G.S. §15A-1420(b)(1).[4]

Following the denial of his first MAR, Petitioner directly appealed his conviction and sentence. Petitioner, however, did not raise his witness immunity claim on direct appeal.

Petitioner did raise his witness immunity claim on his second MAR, which he filed on or about April 2001. The State's reply brief set forth that Petitioner's witness immunity claim should be denied because he failed to raise it on direct appeal, because he failed to adequately raise these contentions in his first MAR, and because it was untimely. Judge Helms specifically adopted the full reasoning of the State's reply and summarily denied the second MAR in an order dated May 31, 2001.

---

[2] The prosecutor has filed an affidavit stating that no immunity agreement was reached with these three witnesses. (Greene Aff.).

[3] The Court notes that in his federal habeas petition, Petitioner alleges that he never authorized his trial counsel to file his first MAR. The Court finds this assertion incredulous given that Petitioner signed a verification stating he had reviewed the attached MAR and that the information contained therein was true to the best of his knowledge. In addition, Petitioner never raised this issue at his first MAR hearing or at any other time during his state court proceedings.

Under North Carolina law, a claim in a MAR is procedurally barred when the Petitioner was in an adequate position to raise the claim on direct appeal but failed to do so. N.C.G.S. § 15A-1419(a)(3). "A federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule." William v. French, 146 F.3d 203 (4th Cir. 1998), cert. denied, 525 U.S. 1155 (1999). Section 15A-1419(a)(3) of the North Carolina General Statutes is such a rule. See Boyd v. French, 147 F.3d 319, 332 (4th Cir. 1998), cert. denied, 525 U.S. 1150 (1999). Because Petitioner's first MAR, which raised his Brady claim, was denied prior to his direct appeal, Petitioner could have raised it on

direct appeal. N.C. Gen. Stat. § 15A-1422 (permitting denial of a claim presented in a previous MAR to be asserted on direct appeal). Consequently, this Court is procedurally barred from reviewing Petitioner's claim due to its denial by the second MAR court pursuant to N.C.G.S. § 15A-1419(a)(3).[5]

Petitioner asserts that his claim cannot be procedurally barred because these issues were not in the record and therefore could not have been raised on direct appeal. Petitioner is mistaken. As stated above, because Petitioner and his counsel raised these claims in his first MAR, which was denied prior to the filing of his direct appeal, and thus they could have raised the claim on direct appeal. Petitioner's failure to do so, as stated above, results in his claim being procedurally barred.

---

[4] Petitioner contends in his habeas petition that his first MAR was filed pursuant to N.C.G.S. § 15A-1414, and that Judge Greeson erroneously used N.C.G.S. §15A-1415 when ruling on his MAR. A review of Judge Greeson's Order reveals that Judge Greeson used the proper statues when ruling on Petitioner's MAR. Petitioner's MAR was filed pursuant to §15A-1414 but some of the claims contained in the motion could not be brought under §15A-1414. The judge, therefore, construed them as claims under §15A-1415. Such a ruling did not, contrary to Petitioner's contentions, "cheat him out" of his MAR under §15A-1415. A petitioner may file more then one MAR.

SEARCH AND SEIZURE

Petitioner also alleges that his conviction was obtained with evidence that was acquired during an unconstitutional search and seizure. More specifically, Petitioner alleges that police continued to search his premises after the Agent Brown ordered the search stopped while he procured a search warrant. To support his contention, Petitioner provides the Court with affidavits from his mother and brother.

Respondent argues, and this Court agrees, that Petitioner is barred from raising his Fourth Amendment claim. In Stone v. Powell, 428 U.S. 465, 494 (1976), the United States Supreme Court held that federal corpus is not available for review of Fourth Amendment claims where the state provided full and fair litigation of the claim. In the instant case,

Petitioner had a full and fair opportunity to litigate, and in fact did litigate, his Fourth Amendment search and seizure claim. (Trial Trans., Vols. I and II). Petitioner filed a motion to suppress which was denied by the trial court. In addition, the North Carolina Court of Appeals denied his illegal search and seizure claim on direct appeal. State v. Miller, 137 N.C. App. 450, 456 (2000). Petitioner also raised this exact claim in his second MAR and it was denied. Consequently, Petitioner is barred from raising his Fourth Amendment claim in this federal habeas corpus proceeding.

Moreover, notwithstanding Petitioner's assertion to the contrary, this Court does not find that the affidavits of Petitioner's mother or brother constitute "new evidence."[6] There is no reason that their testimony was unavailable at the time of Petitioner's trial. Petitioner's broad allegation that he was out of touch with them is unavailing. Moreover, Petitioner was present during the search of his home and does not explain why he could not have raised this issue based upon his own observations.

Petitioner also asserts that photographs of the chief of police's son were discovered in Petitioner's house and that, contrary to trial testimony,[7] at least one picture of the chief's son was removed from evidence several days after the search was conducted for one day and given to the chief before it was returned. This picture was introduced into evidence at trial. (Trial Trans. p. 182). Petitioner argues that had the jury known that the chain of custody been broken it would have diminished the credibility of Captain Holland's entire testimony. Petitioner raised this claim in his second MAR and it was denied. This Court is unaware of any Supreme Court decision that is contrary to the state court's rulings that Petitioner's claim lacked merit.

---

[5] The Court notes that the second MAR court's denial of Petitioner's witness immunity claim was also based upon the earlier MAR's court's finding that his claim was not supported by affidavit as is required by §15A-1420. Section 15A-1420 is an adequate and independent state rule. See Richmond v. Polk, 375 F.3d 309, 323-24 (4th Cir. 2004).

[6] Petitioner raised this precise issue in his second MAR. The state court denied it stating that the constitutionality of the search had already been upheld and that there was no evidence in the record to indicate that Petitioner or his counsel were not in a position to discover this evidence earlier.

[7] At his re-sentencing hearing Petitioner admitted that he was aware of this alleged discrepancy in the chain of custody during the course of the trial. (Re-Sent. Hearing Trans. pp..91-93).

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner also alleges that he received ineffective assistance of counsel. More specifically, Petitioner alleges that his counsel was ineffective when he failed to include the requisite affidavits and documentation when he filed Petitioner's first MAR. Petitioner also alleges that his trial counsel was ineffective for failing to object at an unspecified time during the trial. Finally, Petitioner alleges that his appellate counsel was ineffective.

Petitioner's ineffective assistance of counsel claims are without merit. As an initial matter, Petitioner's claim that he received ineffective assistance of counsel when his trial counsel failed to include affidavits with his first MAR must fail. Section 2254(i) specifically states that the "ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254 (i).

Moreover, Petitioner's contention that he received ineffective assistance of counsel during his trial when his counsel failed to object fails to allege an ineffective assistance of counsel claim. That is, Petitioner provides no specifics whatsoever in either his initial federal habeas petition or in his response to Respondent's Motion of Summary Judgment to support his broad allegation. Petitioner's conclusory allegations are insufficient and therefore are dismissed. See Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992).

Finally, Petitioner's allegation that his appellate counsel was ineffective fails to set forth sufficient facts to support his claim.[8] Petitioner had two direct appeals in the state courts, in which he was represented by different attorneys. Again, Petitioner provides no specifics with this broad allegation and his conclusory allegations are therefore dismissed. See Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992).

---

[8] Petitioner alleged that he had received ineffective assistance of trial and appellate

counsel in his second MAR. In denying his claim the state court adopted the reasoning of the state's reply which argued that Petitioner had failed to present evidence by way of supporting affidavit or transcript testimony as required by N.C.G.S. §15A-1420 (B)(1).

PROSECUTORIAL MISCONDUCT

Petitioner also alleges that the prosecutor failed to correct testimony that he knew to be false. More specifically, Petitioner alleges that the prosecutor allowed Emily Call to falsely testify that she was not granted immunity in exchange for her testimony. In addition, Petitioner alleges that the prosecutor allowed Jeretta Miller to falsely testify as to when the audio tape entered into evidence against him was made.

Petitioner's claim that the prosecution engaged in misconduct when the prosecution permitted Emily Call to falsely testify that she was not granted immunity in exchange for her testimony is procedurally barred. Petitioner did not raise this issue in his direct appeal.[9] Petitioner did raise it in his second MAR but Judge Helm denied this claim as procedurally barred pursuant to N.C.Gen.Stat § 15A-1419. Consequently, because Petitioner has not established cause and prejudice to excuse his failure to raise this claim on direct appeal his claim must fail.

Petitioner also claims that the prosecution engaged in misconduct when the prosecution allowed Jeretta Miller to testify falsely as to the date of her telephone conversation with Petitioner.[10] Again, because Petitioner did not raise this claim in his direct appeal, and because the state court dismissed Petitioner's MAR filing pursuant to N.C.G.S. §15A-1419, he is procedurally barred from federal habeas review of this issue.

---

[9] Petitioner admits that his counsel learned of the alleged immunity agreements 18 days after his trial. It is also uncontradicted that Petitioner's direct appeal was filed approximately two months after his conviction.

[10] Petitioner argues that if the judge had known of the real date on which the tape recording was made he would not have allowed the tape into evidence. A review of the record, however, reveals that the Judge admitted the tape based upon his conclusion that petitioner was aware of the tape recording being made. (Pretrial Trans., Vol. II, p.

39). Interestingly, Petitioner does not allege that his attorney did not have a copy of this tape at the time of trial.

PETITIONER'S CROSS MOTION FOR SUMMARY JUDGMENT

In his response to Respondent's Motion for Summary Judgment, Petitioner too requests that summary judgment be issued in his favor. Petitioner contends that based upon his affidavits and exhibits no genuine issue of material fact exists. This Court disagrees. For the reasons stated above, this Court concludes that summary judgment should be awarded to Respondent. Consequently, Petitioner's Motions[11] for Summary Judgment are denied.

In his motion for summary judgment, Petitioner includes a section entitled "challenges on grand jury and jury selection" and asserts that his counsel was ineffective for failing to pursue these issues. Such a claim may not be added at this point in the litigation as it would be untimely. See United States v. Pittman, 209 F.3d 314, 318 (4th Cir. 2000) ([t]he fact that amended claims arise from the same trial and sentencing proceedings as the original motion does not mean that the amended claims relate back for purposes of Rule 15(c)").

---

[11] Petitioner filed a duplicate motion for summary judgment on November 26, 2001.

THEREFORE, IT IS HEREBY ORDERED that:

1. Respondent's Motion for Summary Judgment is GRANTED;
2. Petitioner's Motions for Summary Judgment are DENIED; and
3. Petitioner's Petition for a Writ of Habeas Corpus is DISMISSED.

This the 24th day of March, 2005.

s/Graham C. Mullen, Chief Judge
UNITED STATES DISTRICT COURT

Appendix C

United States District Court
For The Western District of North Carolina
Statesville Division

JAMES E. MILLER
Plaintiff(s),

vs.

DEAN WALKER, SUPT.,
Defendant(s).

JUDGEMENT IN A CIVIL CASE
CASE NO. 5:01CV135-1-MU

DECISION BY COURT. This action having come before the Court by motions and a decision having been rendered;

IT IS ORDERED AND ADJJUDGED that Judgment is hereby entered in accordance with the Court's March 29, 2005, Order.

FRANK G. JOHN'S, CLERK

s/ Carolyn B. Bouchard, Deputy Clerk

March 29, 2005

Appendix D

No. 506P01 TWENTY-THIRD DISTRICT

SUPREME COURT OF NORTH CAROLINA

(State *v* James Edward Miller)

STATE OF NORTH CAROLINA

v

JAMES EDWARD MILLER

From NC COURT of Appeals
(COA00-1497)
From Wilkes
(98CRS2875-76, 98CRS1207)

ORDER

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the order of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Dismissed by order of the court in conference, this the 4th day of October, 2001.

s/ Butterfield J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of October 2001.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

s/ Carol B. Templeton
Assistant Clerk

Seal of the
Supreme Court of
The State of
North Carolina

Appendix E

NO. COA00-1497-
NORTH CAROLINA COURT OF APPEALS
Filed: 18 September 2001

STATE OF NORTH CAROLINA
v.
JAMES EDWARD MILLER

Wilkes County
Nos. 98 CRS 1207; 1248, 2876

Appeal by defendant from judgment entered 6 June 2000 by Judge Michael E. Helms in Superior Court, Wilkes County. Heard in the Court of Appeals 27 August 2001.

Attorney General Roy Cooper, by assistant Attorney General Anne M. Middleton, for the State.

Maitri, "Mike" Klinkosum for defendant-appellant.

McGee, Judge.

Defendant originally appealed to this Court from judgments entered 24 September 1998 by Judge Howard R. Greeson, Jr. and an opinion was filed in *State v. Miller*, 137 N.C. App. 450, 454, 528 S.E. 2d 626, 629 (2000). Our Court vacated one of defendant's convictions of statutory sexual offense (98 CRS 2875), but found no error as to defendant's remaining convictions. Id. at 461, 528 S.E. 2d at 632. In addition, our Court found that defendant had been denied his right to make a statement in his own behalf at the sentencing hearing. Id. Accordingly, this Court remanded the matter for a new sentencing hearing. Id.

Defendant filed a motion to continue the new sentencing hearing on 16 May 2000. Defendant also filed a motion on 2 June 2000 requesting that Judge Michael E. Helms recuse himself from any involvement in the sentencing hearing. The basis for the motion was defendant's intention to subpoena Judge Helm's to testify in a lawsuit against the North Wilkesboro Police Department filed on behalf of defendant's wife in

federal court. Judge Helms denied both motions on 5 June 2000 and conducted the sentencing hearing. At the conclusion of the hearing, Judge Helms consolidated the convictions for judgment and sentenced defendant to a term of 230 months to 285 months imprisonment. Defendant appeals the trial court's judgment.

Defendant's counsel brings forward two questions on appeal which counsel states might arguably support defendant's appeal, but certifies that he can find no further grounds for appeal after examination of the record and transcript with exception of those two assignments of error. *Anders v. California,* 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498, reh'g denied, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967).

Defendant's counsel states that he forwarded copies of the transcript, record, and the brief filed by counsel to defendant on 19 March 2001 along with instructions informing defendant that he could file his own arguments in this Court if he so desired. Defendant has filed arguments in our Court.

We hold that defendant's counsel has effectively complied with holdings in *Anders,* 386 U.S. 738, 18 L. Ed. 2d 493, and *State v. Kinch,* 314 N.C. 99; 331 S.E. 2d 665 (1985). Pursuant to *Anders* and *Kinch,* we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous. Upon review of the entire record and of the assignments of error noted in the record, we find the appeal to be wholly frivolous.

In his two pro se briefs filed with this Court, defendant reasserts the two arguments submitted by his counsel as having arguable merit- that the trial court erred by denying his motions for a continuance and for the trial court's recusal. Neither argument has merit. " A trial court may continue a sentencing hearing upon a showing of good cause." *State v. Miller,* ___ N.C. App. ___, _____, 543 S.E.2d 201, 208 (2001) (citation omitted). The decision whether to allow such a continuance rests in the trial court's discretion and is not subject to review absent a gross abuse of discretion by the trial court. *State v. Walls,* 342 N.C. 1, 24, 463 S.E. 2d 738, 748 (1995), cert. denied, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996).

Defendant's counsel was appointed on 26 April 2000, and the trial court

began conducting the sentencing hearing on 5 June 2000. Although defendant in his motion to continue cited the need for additional time to arrange for witnesses, he testified at the sentencing hearing that " they turned everybody in his town against me. Couldn't get nobody to come and testify, help me." Defendant's own statement belies his contention that more time was needed to arrange for witnesses. Defendant's counsel did renew the motion to continue at the beginning of the hearing. When asked by the trial court as to why such a motion would be in order, defendant's counsel simply stated defendant was "a little concerned because there was never a formal hearing on the Motion to Continue....". Defendant's counsel did not refer to any witnesses who would be unavailable if the motion to continue were denied. Defendant has failed to show a gross abuse of discretion by the trial court in denying the motion to continue.

As for defendant's contention that the trial court erred by denying his motion to recuse, it is also without merit. The movant has the burden to "demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.'" *State v. Honaker*, 111 N.C. App. 216, 219, 431 S.E. 2d 869, 871 (1993) (quoting *State v. Fie*, 320 N.C. 626, 627, 359 S.E. 2d 774, 775 (1987)). Defendant's basis was his intention to subpoena testimony from Judge Helms in a federal lawsuit filed on behalf of defendant's wife against the North Wilkesboro Police Department. Defendant presented no evidence that Judge Helms would be unable to rule impartially.

Defendant's remaining arguments raise issues which are not relevant in a sentencing hearing. While "relevant mitigating evidence cannot be excluded at a sentencing hearing based upon evidentiary rules[,] ... the testimony must be relevant to defendant's character or record and the circumstances of the offense." *State v. Adams*, 347 N.C. 48, 63, 490 S.E. 2d 220, 227 (1997), cert, denied, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998). A trial court "may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced." *State*

v. Cooper, 238 N.C. 241, 244, 77 S.E. 2d 695, 698 (1953). We have examined defendant's remaining arguments and find them to be without merit.

Defendant also sought to raise issues relating to a motion filed with the trial court on or about 14 January 2001, which the trial court denied in an order entered 13 February 2001. The 13 February 2001 order is not included in the notice of appeal given by defendant on 15 June 2000. Those issues are therefore not properly before this Court. See N.C.R. App. P. 4.

We affirm the judgment of the trial court.

Affirmed.

Judges HUNTER and SMITH concur.

Report per Rule 30 (e).

Appendix F

STATE OF NORTH CAROLINA COUNTY OF WILKES	In the General Court of Justice Superior Court Division File No: 98CRS1207;1248- 1253; 2875-2876
STATE OF NORTH CAROLINA) VS.) JAMES EDWARD MILLER) Defendant)	**ORDER**

This ORDER is in response to a paper writing, entitled "Motion for Appropriate Relief" that was previously filed in the above-captioned matter on October 25th 1998. Pursuant to G.S. 15A-1420 (b)(2) the Clerk, upon receipt of this Motion placed it on the November 2, 1998 criminal docket and promptly brought a copy of the motion to the undersigned who was holding court at that session

.

Pursuant to G.S. 15A-1420 (c)(1) and (2) and BASED UPON THE MATERIALS SUBMITTED the undersigned determines that an evidentiary hearing is not required to resolve questions of fact in that only questions of law are presented.

Pursuant to G.S. 15A-1414 and the Rule of Appellate Procedure 4, the defendant, by and through his Attorney Gregory J. Brewer allege:

1. The Court made errors with regard to motions made before and during the trial, and with regard to the exclusion or admission of evidence. [15A-1414(b)(2)].
2. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury. [(1)(2)].
3. The verdict was contrary to the weight of the evidence.[15A-1414(b)(2)].
4. The Defendant's conviction was obtained in violation of his rights under the United States and North Carolina Constitutions.
5. The Defendant did not receive a fair and impartial trial as protected by N.C.G.S. 1240.

Allegations (1) through (3) and not supported by affidavit ot other documentary evidence. However, they are based upon the existence or occurrence of facts which are within the knowledge of the undersigned.

Allegation (4) avers that "The Defendant's conviction was obtained in violation of his rights under the United States and North Carolina Constitutions. Contrary to Defendant's assertion, this allegation is not pursuant to G.S. 15A-1414. This court, however, will consider and rule upon this allegation in that it has been timely filed and is properly encompassed within G.S. 15A-1415(b)(3).

Allegation (5) avers that "The defendant did not receive a fair and impartial trial as protected by N.C.G.S. 15A-1240. N.C.G.S. §1240 IMPEACHMENT OF THE VERDICT provides:

(a) Upon inquiry into the validity of the verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror concerning the mental process by which the verdict was determined.
(b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
(c) After the jury has dispersed, the testimony of a juror may received to impeach the verdict of the jury on which he served, subject to the limitations in subsection(a), only when it concerns:
    (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's right to confront witnesses against him; or
    (2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

Allegations (4) and (5) are denied and dismissed in that they are not supported by affidavit in violation of G.S. 15A-1420(b)(1). This Court finds that if proper grounds exist to constitute a violation as concluded and contended in violations(4) and (5) the defendant was in a position to adequately raise these contentions properly as mandated by 15A-1420(b)(1).

Allegations 1,2, and 3 are also denied for reasons previously stated on the record and also that the verdict was not contrary to the weight of the evidence.

BASED UPON THE AFORESAID, this Court concludes that the defendant's paper writing entitled MOTION FOR APPROPRIATE RELIEF is heretofore DENIED.

The defendant objects and excepts to the above findings and ruling.

s/ Howard R. Greeson,Jr.
Superior Court Judge, Presiding

Appendix G

STATE OF NORTH CAROLINA

AFFIDAVIT

WILKES COUNTY

I, Gregory J. Brewer, first being duly sworn according to law, depose and say that: I am over the age of 18 and under no legal or physical disability which would prohibit me from making this affidavit. I am an attorney licensed to practice law in the State of North Carolina. I have been so licensed since December 12th, 1986. My State Bar number is 13846. Since I moved to Wilkes County in 1998, a significant portion of my practice has been criminal law. One of my clients was James Edward Miller.

I represented Mr. Miller in 1998 regarding several serious sex offense charges. As part of my work for Mr. Miller, I filed, and served a voluntary request for discovery on the 23rd Judicial District Attorney, Beirne Harding, on April 28th, 1998, by delivering a filed copy to her office. An exact copy of said discovery request is attached hereto and incorporated herein by reference as Exhibit #1. A portion of said request specifically asks for the District Attorney to disclose the "existence of any evidence....which tends or may tend to negate the guilt of the accused."(See subsection J of the request). In addition to the aforesaid request, the state, through the District Attorney, was also required by N.C.G.S. §15A-1054 to disclose "any arrangement authorized" which contemplates grants of immunity from prosecution for witnesses who testify against a defendant.

I did not receive a response to my voluntary request for discovery, so I then filed and served on the District Attorney a Motion for Discovery on May 6th, 1998. An exact copy of this Motion is attached hereto and incorporated herein by reference as Exhibit #2. Clause number 11 of this Motion likewise asks for "all evidence favorable to the defendant regarding guilt or innocence...and any information of an impeaching nature to the due process clause..."

During this entire period of time, there was a contested election taking place between the appointed District Attorney, Beirne Harding, and an Assistant District Attorney, Tom Horner. Our previous District Attorney,

Randy Lynn, had committed suicide a few months earlier, and Mrs. Harding had been appointed to take his place. As I recall, Election Day was Tuesday. May 5th, 1998, the day before I filed my Discovery Motion. Almost immediately after the election, Mrs. Harding moved her office out of Wilkes County and to Yadkin County, which was still within the 23rd Judicial District; but she left the remainder of her office staff and Assistant District Attorneys in Wilkes County.

Some time later, after my Motion had been filed. Assistant District Attorney Graham Greene got in touch with me, and we met in his office in Wilkesboro and reviewed photos, a tape recording, and numerous statements and other evidence pertaining to Mr. James Edward Miller's pending charges. As I recall, Detective Butch Holland was present for one such meeting when the tape recording was reviewed. At no point was District Attorney Harding involved in any meeting, phone call, or other communication with me. Although Mr. Greene provided me with copies of photos, statements, and other information, at no point either prior to or during Mr. Miller's trial did anyone from the District Attorney's office, or any other person, ever reveal to me or to my client, Mr. Miller, that there was any sort of agreement or arrangement not to prosecute witnesses who planned to testify against Mr. Miller at trial.

During the trial of Mr. Miller in September, 1998, several female witnesses testified against him, including Jennifer German, Tabitha Frye, and Emily Call. Ms. German and the other young women who testified, clearly could and should have been prosecuted for their "admitted" involvement in numerous serious sex offenses with a fourteen year old girl, Rachel Miller, who was the purported victim and who was also now the wife of Mr. Miller. Had information of immunity from prosecution been made available to me by the state prior to, or at least during, the trial, then each of these women could have been cross-examined thoroughly about same, and their true motives exposed and their testimony destroyed or diminished. Has such information been made available to me, I would also have been able to argue specifically to the jury about any such arrangements or grants of immunity pursuant to N.C.G.S. § 15A-1055. In my experience, I believe that this would have been compelling evidence to any jury, and it could well have

resulted in a "not guilty" verdict on more counts, if not all of the charges against Mr. Miller.

On September 24th, 1998, Mr. Miller was convicted of numerous charges, including Statutory Rape and Statutory Sexual Offense, and others. None of the female witnesses who testified against him were ever prosecuted or charged to my knowledge. In fact, on October 8th, 1998, I wrote a letter on behalf of Rachel Miller to Mr. David Pendry. the Chief of Police of North Wilkesboro, specifically asking that he seek prosecution of these women. An exact copy of this letter is attached hereto and incorporated herein by reference as Exhibit #3. I sent this letter by Certified Mail, and also sent a copy to the 23rd Judicial District Attorney's office.

Within a very few days, Assistant District Attorney Graham Greene showed up at my office and wanted to speak with me. He was very apologetic and stated that the District Attorney's office could not seek prosecution against Jennifer German, Tabitha Frye or Emily Call because the state had "arrangements" with them for immunity from prosecution. I asked if he was aware of the statues N.C.G.S. §§ 15A-1054 and 1055, and he said that he was. However, at this meeting he never admitted to me that he had possessed personal knowledge of these arrangements either prior to or during the trial of Mr. Miller. If District Attorney Harding had promised immunity to these witnesses, she never communicated any such information to me.

About fifteen minutes after Mr. Greene left my office, I received a phone call from District Attorney Elect, Tom Horner. He apologized for the situation as well, and stated that he had been "out of the loop" on the immunity issue and had no prior knowledge of same. He indicated that apparently Mrs. Harding had made promises regarding immunity to these individuals, and that their office would now be bound by it.

Sworn and Subscribed to Before me
This 19th day of March, 2001
s/ Gwendolyn R. White, Notary Public

s/ Gregory J. Brewer
Affiant

Appendix G

STATE OF NORTH CAROLINA

AFFIDAVIT

WILKES COUNTY

I, Graham T. Greene, first being duly sworn according to law, depose and say that:

I am over the age of 18 and under no legal or physical disability. I am an attorney licensed to practice law in the state of North Carolina and have been so licensed since 1995. In October of 1997, I began work as an assistant district attorney for the 23rd Judicial District (Wilkes, Yadkin, Ashe and Alleghany Counties). At the time of my hiring, Randy Lyon was the District Attorney and Beirne Harding and Tom Horner were assistant district attorneys. In January of 1998, Mr. Lyon committed suicide and Beirne Harding was appointed to finish out his remaining term.

In February of 1998, agents of the N.C. SBI as well as the N. Wilkesboro police department began a criminal investigation into allegations that Mr. James Miller, age 31, was having sexual relations with Rachel Handy, age 14. During the course of the investigation, numerous items were seized and many witnesses were interviewed by the SBI. Three of these witnesses were Jennifer German, interviewed on 2/16/98 and 2/27/98, and Tabitha Frye and Emily Call both interviewed on 3/3/98. During the course of the investigation, Ms. Harding submitted bills of indictments to a Wilkes Grand Jury charging Mr. Miller with numerous counts of statutory rape, indecent liberties with a minor and sexual exploitation of a minor. At no time were charges brought against Jennifer German, Tabitha Frye or Emily Call.

In May of 1998, then assistant district attorney, Tom Horner, defeated Ms. Harding in the republican primary for District Attorney. Following the primary, Ms. Harding assigned me the prosecution of State vs. Miller and moved her office to Yadkin County. Upon being assigned the case, I conducted a review of the file, inquired about the status of discovery, and began to formulate a plea offer. While reviewing the file, I determined that the three witnesses mentioned above had made statements to law enforcement officers that implicated themselves in

criminal conduct with the juvenile.

Upon discovery of this fact, I contacted Special Agent Mike Brown who was the lead investigator for the SBI and inquired as to why criminal charges had not been brought against the witnesses. Special Agent Brown informed me that he had discussed that issue with then District Attorney Harding and that she had made the decision that the aforementioned witnesses were not going to be charged due to their current status as State's witnesses. Special Agent Brown never indicated that this decision was a result of any arrangement with the witnesses or other negotiation with the witnesses and he never indicated whether there had been any immunity discussion with the witnesses. I do not know if Special Agent Brown or Ms. Harding ever communicated this decision directly to the aforementioned witnesses. However, there is o indication of this that I find in the file. Nothing in the witnesses SBI statements or my discussion with Special Agent Brown indicated any understanding, agreement, promise not to prosecute or immunity deal. Simply, as I understood it, a senior prosecutor had exercised her prosecutorial decision and elected not to charge these three witnesses.

After reflection, I deliberated on whether Ms. Harding's decision was correct. I considered circumstances including, but not limited to, their youth and immaturity of the witnesses, their willingness to be truthful with investigators, their apparent remorse, and the facts surrounding their alleged criminal conduct. I further considered the difficulty in bringing a successful prosecution against the witnesses and giving due deference to Mrs. Harding's experience as a prosecutor, I concluded that Mrs. Harding had made a correct decision in not charging the witnesses.

Following my decision, I began to make sure that the State had complied with the law in regards to Mr. Miller's request for discovery. Towards that end, I provided Mr. Miller's attorney, Mr. Brewer, with substantial discovery including witness statements, audio recordings, photographs and other items of evidence. Included in the discovery were the statements of the witnesses, redacted as to their identity. The statements included the descriptions of the acts, which could be considered criminal.

During Mr. Brewer's many visits to our office for discovery and plea

negotiations, Mr. Brewer tried to influence the negotiations by alleging that a Chad Pendry was involved with the juvenile and that it was unfair that Mr. Miller was being prosecuted when "those girls" were not. As to Mr. Pendry, I instructed his client to go to the SBI and give them a statement. As to his complaint that "those girls" were not charged, I would reply alternatively "that's true" or "that's the way it is" or "that's how it is". At no time prior to trial did I inform Mr. Brewer of Ms. Harding's decisions or my agreement or disagreement with it. Mr. Brewer was aware at all times of the criminally inculpatory aspects of the witnesses' statements and they testified consistent therewith at trial. Further, Mr. Brewer was aware up to, during, and after trial that the State had not charged the witnesses with any criminal offense arising out of those statements. At trial, each witness gave testimony consistent with their statements including disclosure of their possible criminal conduct.

Mr. Brewer elicited from Emily Call the following:

Q: Did, after they questioned you, were you charged with anything?
A: No Sir.
Q: You weren't? Even though you said you were in a hot tub kissing women's breast, you weren't charged with anything?
A: No Sir.
Q: Were you concerned about being charged?
A: Yes, I was.
Q: And, they told you they wouldn't charge you with anything if you'd cooperate correct?
A: No, they didn't.
Q: What exactly did they say?
A: They didn't say anything about being charged. I just worried about it myself.
(TTps 208-209)

During Ms. German's testimony she was questioned regarding statements she made in an affidavit concerning allegations of police coercion. She testified as follows:

Q: (By Mr. Green) And, during, in this affidavit, you, you state that you were threatened by the sheriff's department. Did they threaten you?
A: No, they didn't.

Q: That they'd threatened to charge you with child pornography?
A: No
Q: You also state in this affidavit that Mr. Miller had hired, that these officers told you that Mr. Miller had hired hit men to kill you. Did they say that to you?
A: No, they didn't I was scared. I thought of it myself.
(Tps 226-227)

Later on cross-examination of Ms. German, Mr. Brewer elicited the following:
Q: Well, they asked you if you were like a pimp for him, some kind of partnership with him, getting him young girls, didn't they ask you that
A: No, they did not
Q: They did not? Are you sure about that?
A: Yes
Q: Didn't they tell you they were going to charge you?
A: They, I'm sure they could, and I'm sure they mentioned it, but they never said they were going to charge me with anything.
(TTp. 284)

Later during the same cross-examination the following exchange took place:
Q: But they definitely said they could charge you with child molestation?
A: I never said that.
Q: They accused you of bringing girls in for James?
A: No, they never said that.
Q: And they said, "We'd drop"...there's some kind of pending charge against you, they said they'd drop that if you testified, what was that?
A:....they never said that. I, I was scared of James. I was going to tell them anything.
(TTp. 235)

At no time did I, not to my knowledge, Ms. Harding or law enforcement reach any "agreement" with the witnesses in regard to their testimony. At no time was I aware or am now aware of any promises of charge reduction or immunity to the witnesses. To my knowledge at no time were the witnesses coerced or threatened in regards to their testimony by

anyone working for the District Attorney's office or law enforcement. To my knowledge, there was no meeting of the master minds or suggestion that the witnesses' testimony or cooperation would determine their potential future criminal liability. Put simply, prosecutorial discretion was applied and a decision was made not to prosecute early in the investigative process.

Prior to trial, I interviewed, with a member of my staff, each of the witnesses involved in the case. During these interviews I never offered or discussed agreements regarding their testimony. In my pre-trial interview with Ms. German I informed that the state had in fact not charged her with any offense and would not be doing so in the future. I informed her of the criminally inculpable aspects of her statements and informed her that she could exercise a 5th Amendment privilege not to testify. I further informed her that if she so choose to exercise that right, I would make application to the trial judge for immunity. She indicated that those steps would not be necessary because she was willing to testify. Finally, with regards to Ms. German, she did indicate a concern that she could be in trouble for her role in filling out an affidavit alleging police coercion. She indicated that the document was false but it was not sworn. I informed her that the state was not interested in that aspect of her conduct no matter the outcome of the trial.

In September 1998 Mr. Miller was tried and convicted of multiple counts of Statutory Rape, indecent liberties, and sexual exploitation of a minor. Shortly after the trial, our office received copies of letters from Mr. Brewer to various law enforcement agencies demanding that Chad Pendry and the three witnesses be charged. As I know Mr. Brewer and personally like him, I went to his office as to inquire why he was insistent on charges being brought against these witnesses. Mr. Brewer was obviously upset that his client had been convicted and felt it was unfair that "those girls" had not been charged. I informed Mr. Brewer that I was sorry that his client had refused our many plea offers and had been convicted. I also informed him that Ms. Harding had made the decision not to charge the witness "a long time ago", and that I agreed with that decision. At no time did I inform Mr. Brewer that there was any "arrangement". "arrangements" or "immunity" for these witnesses.

Appendix G

In all respects I handled the prosecution of Mr. Miller's case in accordance with the law. I did not ever believe nor do I now believe that I was required to disclose to Mr. Miller or his attorney that which is obvious that a decision had been made not to prosecute the witnesses for crimes arising out of their actions. Both Mr. Brewer and the jury were aware of that obvious condition. The decision not to prosecute was not an agreement reached in consultation with any these witnesses, it was not in exchange for their testimony, nor was their testimony elicited under a promise of immunity. I believe the witnesses testified truthfully in all respects.

s/Graham T. Green

stamp of Notary Public
Alleghany County, NC

Sworn and Subscribed to before Stacy L. Adams on October 26,2001

s/ Stacy L. Adams

Appendix H

September 1998 Trial Testimony of Captain Butch Holland the Leading Investigator in the case. All questions are by the District Attorney and answers are by Captain Holland.

Page 154 Trial Transcript 1998

13- Q. All Right. Have these photos been kept in your care
14- and custody and control since they were seized?
15- A. They Have
16- Q. And have you added or subtracted or altered these
17- photo's in anyway?
18- A. No sir we have not.
19- Mr. Greene: States going to move to introduce
20- States Exhibit number 10

Appendix I-Attorney Klinkosum is now questioning

Page 48 of 2001 Re-sentencing Hearing

10- Q. Now you testified at trial that those photographs
11- had been in your care, custody and control, is that
12- correct.
13- A. That's correct.
14- Q. And in you request for admissions at number
15- 23...
16- Mr. Klinkosum... May I approach the witness
17- your Honor?
18- the Court: Sure
19- Q. (does so) The question at number 23 ask:
20- Defendant Pendry removed the photos from the gathered
21- gathered evidence at some point during the investigation,
22- and the response was: Detective Holland gave David Pendry
23- the photographs of Chad Pendry and three other men which
24- was removed, which was returned to Detective Captain
25- Holland the following day and placed with the other

Page 49

4- evidence from the miller residence? That's what that
5- says?
6- A. That's correct.
10- Q. So Detective Holland, at trial you testified that

11- those Photographs were in your Possession, but in the
12- request for admission, you testified that one was taken
13- out and then given back to you, is that correct?
14- A. That is correct.
15- Q. Why did you testify that way at trial?
16- I....
17- DA Mr. Green: OBJECTION to the relevance, your
18- Honor.
19- The COURT: Are we to that Point were you said
20- you were going to lead, Mr. Klinkosum?
21- Mr. Klinkosum: We are, your Honor.
22- The COURT: Overruled let's see what he has to
23- say, you may answer the question.
24- (NO ANSWER)
25- Q. Nothing further

Page 51 of 2001 Re-sentencing Hearing.
Attorney Klinkosum is asking the questions and Chief David Pendry is answering.
22- Q. Okay. Do you in fact recall receiving a Picture
23- with your son in it from the residence?
24- No Sir.
25- Q. You don't recall that?
Page 52
12- A. No...
13- Mr. Green....OBJECTION, to this line of
14- Questioning, your Honor.
15- The Court: OVERRULED
16- Q. Did Butch Holland give you a picture of Chad Pendry
17- That was seized from the Miller residence?
18- A. At what point are you talking about?
19- Q. Well I'm talking about at any point during the
20- Investigation. Did you receive a Picture from Detective
21- Captain Butch Holland?
22- A. Yes

Appendix I

STATE OF NORTH CAROLINA	)	In the General Court of Justice
	)	
COUNTY OF WILKES	)	Superior Court Division
	)	File No.98 CR 1207; 1248-
STATE OF NORTH CAROLINA	)	1253; 2875-2876
	)	
vs.	)	**MOTION FOR APPROPRIATE**
	)	
JAMES EDWARD MILLER,	)	**RELIEF**
	)	
Defendant.	)	

Now Comes the Defendant, through counsel, and moves the court pursuant to G.S. §15A-1414 and Rule of Appellate Procedure 4, that the Court grant appropriate relief to the defendant, and shows the Court that:

1. On September 24, 1998, the Defendant was convicted of five counts of Indecent Liberties with a Minor, two counts of Statutory Sexual Offense, one count of Statutory Rape, and one count of First Degree Sexual Exploitation.
2. On September 24, 1998, the Defendant was sentenced on the above counts by the Honorable Howard R. Greeson, Jr.
3. The Defendant moves the Court to grant appropriate relief to the Defendant and shows:
   a. The Court made errors with regard to motions made before and during trial, and with regard to the exclusion or admission of evidence.
   b. The evidence, at the close of all the evidence, was insufficient to justify submission of the case to the jury.
   c. The verdict was contrary to the weight of the evidence.
   d. The Defendant's conviction was obtained in violation of his rights under the United States and North Carolina Constitutions.
   e. The Defendant did not receive a fair and impartial trial as protected by N.C.G.S. §15A-1240.

WHEREFORE, Defendant prays the Court that:

1. The Defendant's conviction be vacated and the charges dismissed.
2. Should the court determine that certain evidence should have been excluded at trial then the Defendant receive a new trial.
3. Grant such other relief as the Defendant may be entitled.

This is the 5th day of October, 1998.

BREWER AND BREWER

By: s/Gregory J Brewer
Gregory J Brewer
Attorney for Defendant
204 East Main Street
Post Office Box 225
Wilkesboro, NC 28697
(336) 667-1441
State Bar # 13846

By: s/Brendan C. Edge
Brendan C. Edge
Attorney for Defendant
204 East Main Street
Post Office Box 225
Wilkesboro, NC 28697
(336) 667-1441
State Bar # 23792

THE COURT: So the jury had an opportunity, all twelve of them over there, had an opportunity to, to balance what you are contending...I'm sure Mr. Brewer argued to them that this was all just a way to get their rear ends out of a sling, if you will, and it's all...

DEFENDANT MILLER:....well, Your Honor, that wasn't argued very much. I mean, I, when Chief Pendry come in and set down in my trial, Your Honor, to be honest, my attorney sold me out. He quit. I was going to call Chief Pendry's son to the stand. Chief Pendry's son was at my house partying, and he was there when the pictures was taken. Matter of fact, I believe the man took the pictures. I was in South Carolina.

But I was going to call Chief Pendry's son to testify, and he was going to tell about them taking evidence out of the, the evidence that they collected at my house, Your Honor. And, they had took the evidence. And, and he'd took pictures of his son and destroyed them. Yet, when I go to call Chief Pendry's son to the stand, Chief Pendry comes in, crosses his legs over there on the side, Your Honor, and stares at my attorney; my attorney refused to call him. He, Greg Brewer same as quit. And, I don't blame him. I mean, Greg was, he's got all these people here against him. He's trying to fight the whole county. Do you see what

I'm saying, I'm getting at, Your Honor, on that aspect?
THE COURT: Yes.
DEFENDANT MILLER: I mean, we, we didn't have, we didn't stand a chance. You know, Greg was going to take on these people.
THE COURT: I've never seen that side of Greg Brewer, but I, I understand what you're saying.
DEFENDANT MILLER: Trust me, he, he, he did. I asked him, Your Honor, I said, "Let's call Chad Pendry." I. I got a tape of Chad telling me about his daddy taking the photos out of the evidence, but, yet, now they say that they, they put them back in the next day. I don't know....
THE COURT: ....in your appeal that was successful with regard to one count based on....
DEFENDANT MILLER:....none of this was ever brought up on appeal....
THE COURT:....with improper charges, did you not argue ineffective assistance of counsel with regard to that particular point?
DEFENDANT MILLER: No, Sir.
THE COURT: Who handled your appeal for you?
DEFENDANT MILLER: John Hall in Raleigh. I kind of feel I was sold out on that, too, but Your Honor....
THE COURT:....is John Hall, does these officers

here have some authority or influence over John Hall in Raleigh?

DEFENDANT MILLER: No, sir. No, sir.

THE COURT: Okay.

DEFENDANT MILLER: No, sir, I'm not saying he sold me out on anything...I just feel like he didn't do a, a good job as far as like, the brief and that sort of thing. I'm not saying these guys, officers here had any influence over him at all, sir.

THE COURT: All right. Go ahead.

DEFENDANT MILLER: Okay.

THE COURT: And, the only point I'm trying to make is that everything you've told me up to this point, you've had an opportunity to address in your appeal.

You had an opportunity to address it to the jury....

DEFENDANT MILLER:....no, sir....

THE COURT:....for their consideration...opportunity, okay?

DEFENDANT MILLER: No, sir, I didn't have an opportunity, I never found out about....

THE COURT:....you didn't personally, but your lawyer....

DEFENDANT MILLER:....no, sir....

THE COURT:....if had a chosen to.

DEFENDANT MILLER: No, Sir. My attorney didn't know about all this witness, evidence tampering, them taken the photos out, he never knowed....

THE COURT:...I thought you just said that you was going to call that young man to testify about those things and Pendry came over here and stared at him and he didn't do it.

DEFENDANT MILLER: What do you mean?

THE COURT: I'm sorry?

DEFENDANT MILLER: Yes, yes, sir. He, my attorney was, was going to call Chad Pendry.

THE COURT: Exactly, about all this stuff....

DEFENDANT MILLER:....yeah, that's right. Yes, sir, that's right.

THE COURT: So I, my point is he had an opportunity to address it, and he didn't, for whatever reason, and you had an opportunity to....

DEFENDANT MILLER:....I can't speak on my attorney, attorney's behalf. I don't know that....

THE COURT:....well, you were already. You were accusing him of....

DEFENDANT MILLER:....yeah, well, I'm accusing him of doing something....

THE COURT:....okay....

DEFENDANT MILLER:....but, Your Honor, I, my

attorney, at the time, didn't know that they had actually took photos out. I have later come across a tape.

At the time of the trial, my attorney was going to call Chad Pendry to the stand for, to tell about being at the house and parting and that sort of thing, okay? I mean, it was obvious during the trial he'd been to my house and he'd been partying and that sort of thing, but my attorney did not know about the removal of evidence...I only really discovered this when I, Rachel filed a lawsuit against the police department. They admitted, which I'm going to read that here in a little bit, they admitted to taking a photo out, but they say that they returned it the following day. I mean, you know, there's more than one photo missing, Your Honor. I've got proof right here that there, that there's at least, should at least be five rolls of film.

And, yesterday, Butch Holland gets on the stand and he testifies right here under oath that he, that he got three rolls of film out from underneath my sink, right.

The he sets right here, and he says, "Well, he got what appeared to be a 35 millimeter camera, but actually it was 110. That's for a total of four.

Judy Rhodes testified during my trial, that they brought three rolls of film to Wal-mart to be